

DEC 10 1977

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

NO. 77-595

U. S. INDUSTRIES, INC.,  
*Petitioner,*

v.

JOHN D. PAGE and DON THOMAS,  
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**BRIEF OF RESPONDENTS IN OPPOSITION**

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**OPINIONS BELOW**

The opinion of the Court of Appeals for the Fifth Circuit (App. E of the Petition) is reported at 556 F.2d 356. The opinions of the United States District Court appear as Appendices A, B, C and D of the Petition.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTION PRESENTED

Whether the United States Court of Appeals and District Court were correct in concluding that a private plaintiff's Title VII action is maintainable where the action was brought within ninety (90) days from the plaintiff's receipt of a formal "Notice of Right to Sue" from the Equal Employment Opportunity Commission as provided in 29 C.F.R. § 1601.25.

## STATUTE INVOLVED

The pertinent provision of Title VII of the Civil Acts Right of 1964, as amended, 42 U.S.C. § 2000e *et seq.* [hereinafter "Title VII"], specifically Section 706(f)(1), is set forth in Appendix H of the Petition.

## STATEMENT

This litigation relates to the now abandoned practice of the Equal Employment Opportunity Commission [hereinafter "EEOC"] to issue two separate letters to charging parties at the conclusion of the agency's efforts to conciliate a charge of employment discrimination. Although taking various forms, EEOC's first letter would always advise the charging party that he now had a right to request a "Notice of Right to Sue" and that he would have ninety (90) days from the receipt of the "Notice of Right to Sue" to institute an action in the appropriate

United States District Court. The second letter would be the "Notice of Right to Sue" and would advise the charging party that he had ninety (90) days from receipt of this second letter to institute his action. The two-letter procedure has now been abandoned by EEOC.

In the instant action, Respondent Page, the charging party, filed suit within ninety (90) days from his receipt of EEOC's "Notice of Right to Sue" although more than ninety (90) days from his receipt of EEOC's first letter to him advising of his right to request the "Notice of Right to Sue."

Petitioner's Motion to Dismiss Respondent's Title VII action as untimely was ultimately denied by the District Court (App. C of the Petition). On interlocutory appeal, the Court of Appeals affirmed the District Court (App. E of the Petition).

## REASONS FOR DENYING THE WRIT

### I.

#### THERE IS NO CONFLICT OF DECISION

All appellate courts which have addressed the issue raised in the Petition have concluded, as the Court of Appeals in this case concluded, that a Title VII action may be maintained by a private plaintiff if the plaintiff has filed his Title VII suit within ninety (90) days from receipt of EEOC's formal "Notice of Right to Sue." *Lynn v. Western Gillette, Inc.*, \_\_\_F.2d\_\_\_, No. 76-1256 (9th Cir. November 21, 1977); *Whitton v. ITT Cannon Electric*, \_\_\_F.2d\_\_\_, No. 76-1256 (9th Cir. November 21, 1977); *Turner v. Texas Instruments, Inc.*, 556 F.2d 1349

(5th Cir., 1977); *Williams v. CLE Corporation*, 556 F.2d 346 (5th Cir. 1977); *Zambuto v. American Tel. & Tel. Co.*, 554 F.2d 1333 (5th Cir. 1977); *Weaver v. Joseph Schlitz Brewing Co.*, 551 F.2d 122 (6th Cir. 1977); *McGuire v. Aluminum Co. of America*, 542 F.2d 43 (7th Cir. 1976); *Garner v. E. I. DuPont De Nemours and Co.*, 538 F.2d 611 (4th Cir. 1976); *Williams v. Southern U. Gas Co.*, 529 F.2d 483 (10th Cir. 1976); *Lacy v. Chrysler Corp.*, 533 F.2d 353 (8th Cir. 1976) (en banc), cert. den. 429 U.S. 959 (1977); *DeMatteis v. Eastman Kodak Company*, 520 F.2d 409 (2nd Cir. 1975) modifying 511 F.2d 306 (2nd Cir. 1975); *Tuft v. McDonnell Douglas Corporation*, 517 F.2d 1301 (8th Cir. 1975), cert. den. 423 U.S. 1052 (1976). Cf., *Wilson v. Sharon Steel Corp.*, 549 F.2d 276 (3rd Cir. 1977).

The Court of Appeals for the Fifth Circuit has addressed this issue on at least three occasions in four separate cases and has consistently held that the Title VII action may be maintained. *Turner v. Texas Instruments, Inc.*, supra, *Zambuto v. American Tel. & Tel. Co.*, supra, *Page v. U. S. Industries, Inc.*, supra and *Williams v. CLE Corporation*, supra.

While the Courts of Appeals have disagreed on whether or not the two-step procedure of first advising a charging party of the right to request a "Notice of Right to Sue" was itself justified, compare e.g., *Garner v. E. I. DuPont De Nemours and Co.*, supra (affirmative) with *DeMatteis v. Eastman Kodak Company*, supra (negative), all of the Courts of Appeals have concluded that the charging party could maintain a Title VII action where he had instituted suit within ninety (90) days from receipt of the EEOC's formal "Notice of Right to Sue."

## II.

### THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

Petitioner's attack on EEOC's two-letter procedure is of extremely limited significance since EEOC has abandoned the procedure. *Zambuto v. American Tele. & Tele. Co.*, supra at 1335 n.6; *Weaver v. Joseph Schlitz Brewing Co.*, supra at 123. Thus, any ruling by this Court would have no prospective application. Similarly, the retroactivity of a decision inconsistent with the virtually unanimous position of the Courts of Appeals is questionable in view of the Court's holding in *Chevron Oil v. Huson*, 404 U.S. 97 (1971).

### CONCLUSION

For the foregoing reasons, Respondents respectfully submit that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of December, 1977, three (3) copies of the foregoing Brief for Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed, postage prepaid, to Mr. Samuel E. Hooper of NEEL, HOOPER & KALMANS, 777 South Post Oak Road, Suite 332, Houston, Texas 77056, Attorney for Petitioner, U. S. Industries, Inc. and to Mr. James Watson, Jr., Esq., 500 Texas Professional Tower Bldg., Houston, Texas 77002, Attorney for International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO and its Affiliate Local 561.

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STUART M. NELKIN